IN THE

Supreme Court of the United States

October Term, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,
Petitioner,

AGAINST

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

1. Where respondents were laid off during the term of a collective bargaining agreement which provided for three-year retention of seniority upon continuous layoff and for indefinite preference in employment over new employees, did petitioner's refusal to re-employ respondents with seniority at the new plant to which its operations had been shifted, constitute a breach of the agreement for which petitioner is answerable in damages?

2. Did the participation in this case of Judge Madden of the Court of Claims, sitting in the Court of Appeals by designation of the Chief Justice of the United States, invalidate the judgment of the Court of Appeals?

Constitutional Provisions and Statutes Involved

Respondents do not believe that some of the constitutional provisions referred to at page 3 of the petition are involved in this case, for the following reasons:

Article I of the Constitution of the United States is not involved because no legislative powers vested in Congress under Article I are in question in this case.

49 Stat. 452; 61 Stat. 140; 65 Stat. 601; 73 Stat. 525, 542, 545; Title 29 U. S. C. § 158 (a), (1), (5); (b), (1), (3), are not involved because no unfair labor practices governed by those statutes are involved in this case.

61 Stat. 40; Title 29 U. S. C. § 157 is not involved because the right of employees to organize and bargain collectively is not in issue in this case.

61 Stat. 156; Title 29 U. S. C. § 185 (a) is not involved because jurisdiction of the District Court was invoked in this case on the ground of diversity of citizenship, and not under the provisions of the statute cited.

Statement of the Case

A. Nature of the Action.

Respondents brought this action against petitioner in the New York Supreme Court to recover damages for breach of a collective bargaining agreement made by petitioner and respondents' union, the benefits of which enure to respondents. On petitioner's application the cause was removed, by reason of diversity of citizenship, to the United States District Court for the Southern District of New York.

The gist of the action was that petitioner breached the contract and thereby deprived respondents of employ-

ment and of substantial property rights accruing to them thereunder, including rights under a pension plan, a welfare plan, and a group insurance plan.

B. Pertinent Provisions of the Contract.

In 1929 petitioner began to operate a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. Respondents were continuously employed by petitioner at this plant for periods of from 10 years to 25 years.

Effective December 1, 1949, petitioner and respondents' union entered into a series of collective bargaining agreements, the last of which embraced the two-year period from December 1, 1955 to November 30, 1957. Each of these agreements provided for a system of seniority for employees under which, in case of curtailment of production, employees were to be laid off in the reverse order of seniority. Seniority could be terminated only for the following reasons: (1) quitting voluntarily; (2) discharge for cause; (3) failure to acknowledge within 2 days a notice to report for work; (4) failure to return to work within 3 days after being notified to report to work. Seniority could also be terminated by reason of *continuous layoff*. As to this the agreement provided:

> "(b) In instances of continuous layoff, seniority shall be terminated after:
>
> (1) An employee with less than five (5) years' continuous employment at the time his layoff began is on a continuous layoff of two (2) years; or
>
> (2) An employee with more than five (5) years' continuous employment at the time his layoff began is on a continuous layoff of three (3) years.

(c) Employees whose seniority is terminated due to continuous layoff shall receive first preference for employment before new employees are hired."

Each respondent having been employed by petitioner for more than five years, his seniority would not terminate until three years elapsed from the date of his layoff.

C. Transfer of Operations from Elmhurst, New York to Bethlehem, Pennsylvania.

On September 16, 1957, petitioner notified the union that it would terminate the agreement on its expiration date of November 30, 1957. Thereafter, petitioner progressively discontinued production at the Elmhurst plant and began to remove its machinery and equipment from Elmhurst to a new plant it was setting up in Bethlehem, Pennsylvania, which it had leased in May, 1957. During October, November and December of 1957, petitioner transferred from Elmhurst about 75% of the machinery used in Bethlehem in coconut operations, and approximately 25% of the machinery used in Bethlehem in condiment and spice operations. It also installed additional equipment there and effected some procedural changes to increase production. Operations at Bethlehem were begun in November and December, 1957.

Although petitioner closed the Elmhurst plant on November 30, 1957, respondents' employment was terminated while the agreement was still in effect and the plant still in operation. All respondents were laid off on November 1, 1957, except respondent John Zacharczyk, who was laid off on November 18, 1957. None of respondents has been employed by petitioner since that time, nor has any of them received any benefit, compensation or other consideration by reason of employment by petitioner.

Petitioner did inform respondents that they could apply for work only as new employees at the Bethlehem plant, along with all other applicants for employment there. Petitioner refused to employ respondents at the Bethlehem plant with credit for seniority earned and accrued during the periods of their employment by petitioner at Elmhurst.[1]

At Bethlehem, petitioner hired new employees who perform duties of the same nature as respondents had performed at Elmhurst. Petitioner manufactures at Bethelehem the same products it manufactured at Elmhurst at the time it closed that plant.

D. Proceedings Below.

The District Court (Palmieri, D. J.) concluded that respondents

> "have failed to prove facts which would entitle them to the relief sought"

and directed judgment on the merits against them. The court stated that the critical issue was not whether respondents' seniority rights survived the termination of the contract period, "but whether the unit to which their rights could attach extended beyond the Elmhurst plant." Upon review of the facts and a construction of the agreement, the court concluded that

> "the parties' bargain and understanding was limited to seniority rights at the Elmhurst plant."

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[1] Not only were respondents deprived of employment by reason of petitioners' refusal to acknowledge their seniority rights, but they lost other benefits as well. A *pension plan* covering them provided for normal retirement at 65; retirement for disability at 55; early retirement at 55, on 15 years' employment; and vested right at 45, on 15 years' employment. A *welfare plan* afforded medical, surgical and hospital insurance. A *group insurance plan* provided for life insurance and accidental death insurance.

On appeal by respondents to the Court of Appeals for the Second Circuit, the judgment was reversed. The opinion of the court was written by Judge Madden of the Court of Claims (sitting by designation) and concurred in by Judge Waterman. Chief Judge Lumbard dissented in a separate opinion.

The court construed the contract; it found, first, that respondents' seniority rights survived the termination of the contract period, saying:

> "If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks."

The court found, further, that respondents were entitled to be employed by petitioner at its Bethlehem plant in the circumstances here involved, saying:

> "A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it."

Chief Judge Lumbard's dissent was based upon a different construction of the contract. He said:

> "The issue here is whether *this* collective bargaining agreement gave the employees the right to follow the work to the new site. I would hold that it did not." (Emphasis supplied.)

The basis for this conclusion is the same as that of the District Court, namely, the absence of an express provision in the contract requiring inter-plant transfer of seniority rights.

ARGUMENT

I

This action by individual employees to recover damages for breach of contract by an employer, federal jurisdiction being based solely on diversity of citizenship, involves interpretation of the seniority provisions of a particular collective bargaining agreement and does not present an important question of federal law which should be settled by this Court.

A. No important question of federal law is involved.

Seniority is a highly prized personal right based upon contract, which accrues to an employee from his length of service. It "is more than merely the right to work; it is the best kind of unemployment insurance. It assures the man that the longer he works the more certain it is that he will retain his job at a wage greater than the small amount available for unemployment compensation". Pipin, *Enforcement of Rights Under Collective Bargaining Agreements,* 6 U. of Chi. L. R. 657 (1939); see also *Dooley* v. *Lehigh Valley R. R. Co.,* 130 N. J. Eq. 75 (1941).

Seniority provisions in collective bargaining agreements enure directly to the benefit of individual employees and may be enforced by them personally. *Parker* v. *Borock,* 5 N. Y. 2d 156, 160 (1959).

There are "great variations" in seniority provisions of collective bargaining agreements. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell,* 337 U. S. 521, 526 (1949).

The two-year collective agreement in this case preserved respondents' seniority for a period of three years after continuous layoff and conferred employment rights

thereafter in their favor in preference to new employees.[2] In the circumstances respondents' seniority rights were retained to November, 1960, and respondents were entitled to a preference in employment at the Bethlehem plant. Petitioner's hiring of new employees there, while refusing to employ respondents with seniority, constituted a breach of the agreement. The fact that the agreement expired after respondents' layoff did not alter this result since their seniority rights clearly survived the expiration of the contract period. It is not novel doctrine that rights accrued or arising during the effective period of a collective bargining agreement are not terminated merely because the period of the agreement has run out. *In re Wil-low Cafeterias*, 111 F. 2d 429 (2d Cir. 1940); *Owens* v. *Press Publishing Co.*, 20 N. J. 537 (1956); *Matter of Potoker* (*Brooklyn Eagle*), 286 App. Div. 733, 736 (1st Dept. 1955), aff'd 2 N. Y. 2d 553, 560 (1957), cert. den. 355 U. S. 883 (1957).[3]

Nor was petitioner excused from its contractual obligation to recognize respondents' seniority rights under the

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[2] Petitioner's preliminary contention that this was not a layoff but a termination of employment (Petition, p. 8) overlooks the fact that the seniority provisions of the contract refer to "continuous layoff". Moreover, it begs the question at issue: did petitioner have the contractual right to terminate respondents' employment in the circumstances here involved? 1 Williston on Contracts (3rd ed. 1957), § 39A. Petitioner's dismissal of respondents during the life of the contract in anticipation of relocation of the Elmhurst plant was in any event a layoff. *In re Public Ledger*, 161 F. 2nd 762 (3rd Cir. 1947); *McNamara* v. *The Mayor, etc.*, 152 N. Y. 228 (1897).

[3] In the arbitration proceeding which followed the judicial proceedings in *Matter of Potoker* (*Brooklyn Eagle*), Professor W. Willard Wirtz, the arbitrator, in a comprehensive review of the contract and the applicable legal authorities, held that an employer cannot terminate its accrued contract obligations toward employees by terminating the contract and discontinuing business operations. *Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156 (1959).

agreement because it relocated its plant. See *Metal Polishers Local 44* v. *Viking Equipment Co.*, 278 F. 2d 142 (3rd Cir. 1960). The seniority provisions of the agreement were applicable to the situation here involved; petitioner was not altogether discontinuing business, but merely shifting operations from one site to another; at the new location it continued to manufacture the same products as it had manufactured at the old, and with use of much of the machinery and equipment used by it at the former plant. Respondents' personal rights of seniority earned by length of service, were not completely destroyed by petitioner's act of shifting its plant from one place to another. The Court of Appeals so held. To have construed the contract otherwise in this case would have substantially deprived the seniority provisions of meaning.

The case involves no substantial questions of federal substantive law, and heretofore no claim to this effect was at any time made by petitioner. The issues were presented and the case argued on the basis of applicable state law and, we believe, correctly so.

First, federal jurisdiction was not and could not be invoked under §301 of the Labor Management Relations Act (61 Stat. 156, Title 29 U. S. C. §185), since this action was brought by individual employees for the protection of rights which are uniquely personal. *Association of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 460-461 (1955), rhg. den. 349 U. S. 925 (1955). See *Schatte* v. *International Alliance, etc.*, 84 F. Supp. 669, 672 (D. C. S. D. Calif., 1949), affd. 182 F. 2d 158, 164 (9th Cir. 1950), cert. den. 340 U. S. 827 (1950), rhg. den. 340 U. S. 885 (1950); *Local Lodge No. 2040 etc.*, v. *Servel, Inc.*, 268 F. 2d 692, 695-7 (7th Cir. 1959), cert. den. 361 U. S. 884 (1959); *United Steelworkers* v. *Pullman-Standard Car Mfg. Co.*, 241 F. 2d 547 (3rd Cir.

1957); *Silverton* v. *Valley Transit Cement Co.*, 249 F. 2d 409 (9th Cir. 1957).

The rule of *Westinghouse* has not been impaired by *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957).[4] In the latter case this Court pointed out that *Westinghouse* "is quite a different case" because it involved individual rights of employees, p. 456, fn. 6. Since the case at bar involves individual seniority rights of employees, there is no valid basis for petitioner's assumption that, contrary to *Westinghouse*, a labor organization would be permitted to invoke federal jurisdiction under §301 for the enforcement of such rights or that federal substantive law is applicable. Moreover, the holding of *Lincoln Mills* is expressly limited to "suits under §301(a)."

Nor does this case involve any unfair labor practice or the right of employees to organize and bargain collectively. Cf. *N. L. R. B.* v. *Rapid Bindery, Inc.*, ... F. 2d .... (2d Cir., July 11, 1961), 48 LRRM 2658.

Petitioner's contention that for it to have recognized the seniority of respondents at the Bethlehem plant "might well have constituted an unfair labor practice", an interference in the selection of a collective bargaining agent for the Bethlehem plant employees, is speculative and unsubstantial; indeed, this argument necessarily implies that

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[4] This question was not argued in the Court of Appeals, but Chief Judge Lumbard, in his dissent, said:

> "The parties have assumed here that the Supreme Court's decision in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957) did not *sub silentio* overrule the distinction between 'individual' and 'union' rights announced in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Co.*, 348 U. S. 437, 461 (1955)."

whenever an employer enters into an agreement which provides expressly for inter-plant transfer of seniority, he may likewise be committing an unfair labor practice. Such a position is, of course, untenable. We must note in passing that petitioner's reference (Petition, page 5, footnote 1) to the selection of a different collective bargaining agent by the Bethlehem plant employees (a statement also made by several parties who have moved for leave to file briefs as *amicus curiae*) finds no basis in the record. The Court of Appeals in fact stated:

> "The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement, at the time the plant was opened."

For the reasons stated this case is not one which presents questions of substance under federal law requiring resolution by this Court. The case was properly decided by the Court of Appeals on the basis of a construction of the contractual provisions here involved and the application of the pertinent law. The position taken by the District Court and the dissenting judge in the Court of Appeals—that an explicit provision for inter-plant transfer of seniority rights is indispensable to the recognition of respondents' rights—is based upon a construction of the contract which is not, we believe, warranted. As stated by Professor Archibald Cox in *Reflections Upon Labor Arbitration,* 72 Harv. L. R. 1482 (1959), "verbal incompleteness is inevitable in drafting collective bargaining agreements." He notes (at pp. 1491-1492):

> "A collective bargaining agreement rarely expresses all the rights and duties falling within its scope. One cannot spell out every detail of life in an industrial establishment."

And, declares Professor Cox, "the process of interpretation [of a collective bargaining agreement] cannot be the same [as in the case of a deed or promissory note or corporate trust indenture] because the conditions which determine the character of the instruments are different."

B. There is no conflict of decisions.

Petitioner's contention that the decision of the Court of Appeals in this case collides with decisions in the Fifth, Sixth and Seventh Circuits will not survive critical examination.

System Federation No. 59 v. *Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941), cert. den. 314 U. S. 656 (1941) was an action for loss of wages resulting from a claimed denial of seniority rights under a 1929 contract. The seniority provisions, quoted in the opinion, *did not extend beyond the contract period,* as they do in the case at bar. Further, the 1929 contract was completely abrogated in 1931 and in lieu thereof other seniority rules were set up, effective up to 1937 when an agreement was entered into confirming and settling the seniority established by the rules.

It was in view of these circumstances that the court said that the 1929 seniority provisions did not indefinitely continue to exist after abrogation of the contract and the substitution of other seniority rules, later confirmed by another agreement. In the case at bar, by contrast, three-year seniority provisions extend beyond the termination date of the agreement, preference over new employees is recognized, and these provisions have not been superseded by others as in the case cited. There is thus no conflict with the *System Federation* case.

Elder v. *N. Y. Central R. R. Co.*, 152 F. 2d 361 (6th Cir. 1945) was an action to recover wages lost by reason of

a claimed unlawful deprivation of seniority rights. The critical factor leading to the decision in the cited case was that the senority provisions relied on *were modified by mutual agreement between the union and the employer* so as to deny the employee the rights asserted. In the case at bar, on the other hand, there was no modification of respondents' seniority rights, as the Court of Appeals pointed out, so as to deprive respondents of those rights. There is thus no conflict with the *Elder* case.

Local Lodge No. 2040, etc. v. *Servel, Inc.*, 268 F. 2d 692 (7th Cir. 1959), cert den. 361 U. S. 884 (1959) is basically different from the case at bar among other respects, in that the employer there *completely discontinued all manufacturing operations* and did not merely shift them from one site to another, as in the case at bar. Because of the factual distinctions the issues in *Servel* were different. Involved in *Servel* were (1) whether the discharge of employees in the circumstances was made without just cause in violation of the collective agreement, and (2) whether a two-year seniority provision gave the employees vested rights in fringe benefits for such period.[5] The court declared (p. 698):

> "Contrary to appellants' contention, we find nothing in the agreement providing for *permanent* layoff status to those employees or giving vested rights to seniority for two years following their layoff." (Emphasis the court's.)

In marked contrast, the agreement at bar *does afford permanent, indefinite layoff* status by the provision that

[5] Since there was no possibility of re-employment by Servel, all of the employer's operations having completely terminated, the employees could not obtain the fringe benefits by continued employment. Thus, they had to claim vested rights in those benefits at the time of discharge, although quite clearly the benefits had not in fact then vested.

> "Employees whose seniority is terminated due to continuous layoff shall receive first preference for employment before new employees are hired." (Article XI, sec. 6(c))

Moreover, there is an unconditional right to seniority in the provision that in case of continuous layoff, seniority is preserved for a three-year period. There is thus no conflict with the *Servel* case.

Upon analysis, it is evident that there is no real conflict of decision upon the same subject mater. Substantial variations exist among the cases which readily differentiate them. Accordingly, petitioner's allegation that a conflict is present which requires settlement by this Court cannot be established.

II

Judge Madden's participation in this case does not nullify the judgment of the Court of Appeals. The Act of July 28, 1953, 67 Stat. 266, Title 28 U. S. C. §171, which declares the Court of Claims to be an Article III Court is constitutional.

The statute cited provides *inter alia* with respect to the Court of Claims:

> "Such court is hereby declared to be a court established under article III of the Constitution of the United States."

Petitioner contends that the statute is unconstitutional, and that participation in this case by Judge Madden of the Court of Claims, who was designated in January 1961 "to perform judicial duties"[6] in the Court of Appeals for

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[6] 72 Stat. 848, Title 28 U. S. C. §293(a).

the Second Circuit and who heard the appeal herein on February 8, 1961, vitiated the judgment of the Court of Appeals.

Petitioner offers no reasons to support its claim that Congress lacked the power to enact the 1953 statute, but apparently takes the position that only a constitutional amendment can establish the character of the Court of Claims as an Article III court. We submit that petitioner's contention is palpably unsubstantial.

Certainly nothing could be plainer than the background and the language of the statute as to its purpose to declare that the Court of Claims is an Article III court. 1953 U. S. Code Cong. & Adm. News, p. 2006 (83rd Cong., 1st Sess., House Report No. 695). This is within the power of Congress.

Congress possessed not less than two powers under which it might have created the Court of Claims. One was the power to pay the debts of the United States, granted by Article I of the Constitution. In addition, Article III, Section 1 provides that Congress may establish inferior courts to exercise the judicial power. Article III, Section 2 provides that

> "The judicial Power of the United States shall extend * * * to Controversies to which the United States shall be a Party * * *."

The United States is a party in all cases in the Court of Claims. Manifestly, therefore, Congress could declare that the Court of Claims is an inferior court which exercises the judicial power as defined in Article III.

As stated in the House Report (*supra* p. 2009):

> "* * * it would certainly seem proper for the body which created the Court of Claims to declare

whether, in the creation of it, Congress intended to exercise Article I or Article III power."

Congress has validly exercised its power to declare that the Court of Claims is an Article III court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

August 15, 1961.

Respectfully submitted,

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